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Signature Date

UNITED STATES PATENT AND TRADEMARK OFFICE

Application No: 10/057,622

On: Improved Centrifugal Impeller

Inventor: John F. O'Connor, Jr.

Filed: October 25, 2001

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) Examiner
) Tho V. Duong
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)
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) ART UNIT
) 3743
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Torrington, Connecticut February 25, 2004

Commissioner of Patents and Trademarks
P.O. Box 1450
Alexandria, VA 22313-1450

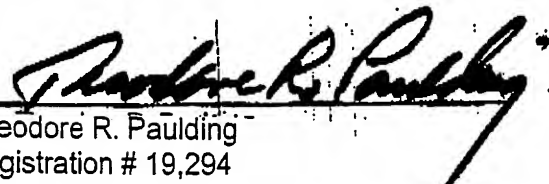
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**PETITION TO REVIVE UNDER 37 C.F.R. 1.137(a) (RECONSIDERATION) AND
UNDER 37 C.F.R. 1.137(b).**

This petition is in the alternative under the above C.F.R. Sections.

- 1.) Reconsideration is respectfully requested of the dismissal of the petition filed October 31, 2003 incorporated herein by reference the June 20, 2003 response, Exhibit A, including an Express Mail Receipt dated June 20, 2003 is attached and is believed to avoid abandonment as suggested in the dismissal notice of January 29, 2004.
- 2.) Alternatively, the Commissioner is respectfully petitioned to revive the above application under 37 C.F.R. 1.137(b) as unintentionally abandoned. The entire delay in filing the required reply from the due date for the reply until the filing of this petition was unintentional.
- 3.) The required fee of \$ 665.00 under 37 C.F.R. 1.137(b) is enclosed.

Respectfully submitted,


Theodore R. Paulding
Registration # 19,294



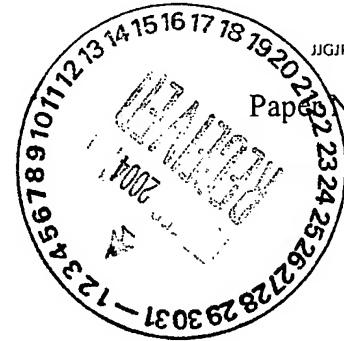
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Page No: 8

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JAN 29 2004

OFFICE OF PETITIONS

In re Application of
O'Connor
Application No. 10/057,622
Filed: 25 October, 2001
Attorney Docket No. 3135-22

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ON PETITION

This is a decision on the petition filed on 31 October, 2003, to revive the above-identified application under 37 C.F.R. §1.137(a)

For the reasons set forth below, the petition under 37 C.F.R. §1.137(a) is **DISMISSED**.

NOTES:

- (1) Any petition (and fee) for reconsideration of this decision under 37 C.F.R. §1.137(a) (as to unavoidable delay) or an alternative request for relief under 37 C.F.R. §1.137(b) (as to unintentional delay) must be submitted within two (2) months from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(a)"; and/or "Petition under 37 C.F.R. §1.137(b)";
- (2) Thereafter, there will be no further reconsideration of this matter.

BACKGROUND

The record reflects that:

- Petitioner failed to reply timely and properly to the Notice of Non-Compliant Amendment mailed on 28 May, 2003, with a reply due (absent a request and fee for extension of time) on or before Monday, 30 June, 2003;
 - as a result, the application was deemed abandoned after midnight 28 June, 2003;
 - no Notice of Abandonment was mailed before the instant petition was filed;
 - the petition and accompanying declaration apparently ignore both the events of September 2001 and the subsequent November, 2001, biological attacks through the US Postal Service (USPS) system that brought to a halt many parts of mail operations on the east coast of the United States, and recite alleged delay by the Office in forwarding to Petitioner in February 2002 the filing receipt (for the 25 October, 2001, filing date) as the instigation of Petitioner's unavoidable delay;
 - according to the allegations of the petition and accompanying declaration, the four month period between the filing of the application and delivery to Petitioner of the filing receipt caused Petitioner's staff to submit papers twice with the wrong application number-- which error the Petitioner and Declarant acknowledge the Examiner ignored and nonetheless addressed the filings in the instant (and proper) application;
- however, it was Petitioner's failure to reply timely and properly to the 28 May, 2003, Notice that triggered the abandonment, and despite Declarant's statement otherwise, there is no documentary evidence that reply was mailed until shipment of the USPS Express Mail package bearing Label No. EU802507199US on 31 October, 2003, by which the instant petition also was transmitted;
- as indicated, the reply was filed with the instant petition.

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).¹

¹ 35 U.S.C. §133 provides:
35 U.S.C. §133 Time for prosecuting application.
Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.² Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴

And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶))

Petitioner has failed to: make a showing of unavoidable delay.

Accordingly, in view of the record, the petition as considered under 37 C.F.R. §1.137(a) hereby is **dismissed** for failing to satisfy the "showing" requirement.

ALTERNATIVE VENUE

If Petitioner is unable to make a showing of unavoidable delay surpassing that tendered

applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

³ See: Changes to Patent Practice and Procedure; Final Rule Notice, 62 *Fed. Reg.* at 53158-59 (October 10, 1997), 1203 *Off. Gaz. Pat. Office* at 86-87 (October 21, 1997).

⁴ See: In re Application of G. 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 *Off. Gaz. Pat. Office* 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 *Off. Gaz. Pat. Office supra*.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared and/or deposited for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely prepared and/or deposited for shipment.

heretofore, Petitioner's only alternative to irretrievable abandonment likely is to file a petition and fee as set forth at NOTE 1, above at page 1, under 37 C.F.R. §1.137(b), and state therein that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition (with fee) pursuant to 37 C.F.R. §1.137(b) was unintentional."

Thus, Petitioner may wish to supplement his petition to plead alternatively under 37 C.F.R. §1.137(b) wherein the "showing" burden is much less onerous.

Petitioner is cautioned that failure to submit such a petition 37 C.F.R. §1.137(b) timely may be viewed as intentional delay and an absolute bar to revival.

Further correspondence with respect to this matter should be addressed as follows:

By mail: (Effective 1 May, 2003)⁷
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (703) 872-9306
ATTN.: Office of Petitions

By hand: Crystal Plaza Four, Suite CP4-3C23
2201 South Clark Place
Arlington, VA 22202

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.



John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁷ To determine the appropriate addresses for other subject-specific correspondence, refer to the USPTO Web site at www.uspto.gov.